No. 03-1554

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

KENNETH PLEDGER, individually and on behalf of his minor children, Darnell Pledger, Rachel Robinson, Deira Johnson, Ivan Pledger, Storm Pledger, and Jilasea Henry, and TRIXINE PLEDGER,

Petitioners,

v.

PHIL GUILBEAU OFFSHORE, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Fifth Circuit Court of Appeal's *per curiam* decision properly applied the law as set forth in the case of *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156, 101 S. Ct. 1614, 68 L. Ed. 2d 1 (1981).

STATEMENT PURSUANT TO RULE 29.6

Respondent, Phil Guilbeau Offshore, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
STATEMENT PURSUANT TO RULE 29.6	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	iv
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	3
REASONS FOR DENYING THE PETITION	4
I. THERE IS NO CONFLICT BETWEEN THE CIRCUITS	4
A. The *Davis* Case In The Third Circuit	4
B. The *Bjaranson* Case In The Ninth Circuit	5
II. PETITIONERS' MISSTATEMENTS	6
A. Misstatements Of Law	6
B. Misstatements Of Fact	7
CONCLUSION	9

TABLE OF CITED AUTHORITIES

Page

CASES

Bjaranson v. Botelho Shipping Corporation, Manila, 873 F.2d 1204 (9th Cir. 1989) 3, 5, 6, 9

Breaux v. United States, 1996 WL 626328 (E.D. La. 1996) 7

Clay v. Daiichi Shipping, 237 F.3d 631 (5th Cir. 2000) 7

Davis v. Portline Transportes Maritime Internacional, 16 F.3d 532 (3d Cir. 1994) 3, 4, 5, 9

Howlett v. Birkdale Shipping Co., S.A., 512 U.S. 92, 114 S. Ct. 2057, 129 L. Ed. 2d 78 (1994) 7

Scindia Steam Navigation Co., Ltd. v. De Los Santos, 451 U.S. 156, 101 S. Ct. 1614, 68 L. Ed. 2d 1 (1981) ..... *passim*

STATEMENT OF THE CASE

On June 14, 2001, Halliburton Energy Services, Inc. employed a three man crew made up of petitioner Kenneth Pledger, William Meehan, and Harshari Powdrell ("Halliburton crew"). *Ct. R. at 000066 and 000075.* Their job was to service and maintain various offshore oil and gas installations in the Gulf of Mexico. After completing their work on June 14, 2001, these men took showers and packed for their ride back to Cameron, Louisiana aboard the M/V TONY G, a utility vessel owned by respondent Phil Guilbeau Offshore, Inc. *Ct. R. at 000069-70 and 000079-80.*

On this particular job, Halliburton worked for Stone Energy Corporation ("Stone Energy"). *Ct. R. at 000078.* As they prepared to board the utility boat for the ride to shore, the Stone Energy representative ("company man") asked William Meehan if the Halliburton crew would backload Halliburton's equipment from the liftboat RAM IX to the cargo deck of the M/V TONY G. *Ct. R. at 000080.* Mr. Meehan, who was the Halliburton crew's foreman, assessed the wind, seas, and weather conditions, and decided at that time that his crew could safely perform the backloading operation. *Ct. R. at 000080-81.* Mr. Meehan had the authority to refuse to perform cargo operations when he felt those operations could not be conducted safely. *Ct. R. at 000081.*

The Halliburton crew was transferred from the RAM XI to the M/V TONY G's back deck in a personnel basket. *Ct. R. at 000068, 000076, and 000088.* Once on the back deck of the M/V TONY G, Mr. Meehan noticed that the back deck was slippery. *Ct. R. at 000077.* Mr. Meehan held a safety meeting with Pledger and Powdrell to discuss the slippery condition of the M/V TONY G's back deck. *Ct. R. at 000077, 000081, and 000089-90.* After discussing the wind, seas, and the M/V TONY

G's slippery back deck, Mr. Meehan testified, "We decided that we could do it safely and went ahead with that job." *Ct. R. at 000077.*

The three men who made up the Halliburton crew were the only individuals involved in the backloading operation. *Ct. R. at 000267.* The crew of the M/V TONY G was not involved in the backloading operation at all. *Ct. R. at 000267.* During the backloading operation, the Halliburton equipment was being hoisted by a crane located on the RAM XI. The crane was being operated by an Aries Marine Corporation employee, Larry Hebert. *Ct. R. at 000237-38.* Mr. Meehan was communicating with Mr. Hebert from his position on the back deck of the M/V TONY G, providing signals to show where the Halliburton equipment should be placed. *Ct. R. at 000305.*

Captain Austin Darby was the master of the M/V TONY G on June 14, 2001. *Ct. R. at 000094-95.* Captain Darby testified that the Halliburton crew was controlling the backloading operation that occurred on June 14, 2001. *Ct. R. at 000097.* Captain Darby had turned over the back deck of the M/V TONY G to the Halliburton crew. *Ct. R. at 000098.* While Captain Darby did direct the placement of the first and heaviest piece of equipment loaded, the skid unit with the wireline (*Ct. R. at 000097*), that was done only to ensure that weight was evenly distributed on the cargo deck of his vessel. After the placement of the skid unit with the wireline, Captain Darby's only participation in the backloading operation was maneuvering the M/V TONY G (*Ct. R. at 000098*), in order to keep the M/V TONY G as stationary as possible (*Ct. R. at 000096*).

After the placement of approximately six to eight pieces of the Halliburton equipment onto the back deck of the M/V TONY G, Pledger slipped and fell. Mr. Pledger fell while holding onto a "tag line". A tag line is a length of rope attached to the piece of equipment, and it is used to help guide and control the piece of equipment as it descends.

SUMMARY OF THE ARGUMENT

The Fifth Circuit properly applied this Court's decision in *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156, 101 S. Ct. 1614, 68 L. Ed. 2d 1 (1981). There is no conflict between and/or among the Fifth Circuit's decision in this case and the Third and Ninth Circuit's decisions in *Davis v. Portline Transportes Maritime Internacional*, 16 F.3d 532 (3d Cir. 1994), and *Bjaranson v. Botelho Shipping Corporation, Manila*, 873 F.2d 1204 (9th Cir. 1989). *Davis* and *Bjaranson* simply involve different factual scenarios than that presented by the uncontroverted record in this case.

REASONS FOR DENYING THE PETITION

I. There Is No Conflict Between The Circuits

A. The *Davis* Case In The Third Circuit

In the *Davis* case, the Third Circuit reversed the district court's granting of the defendant's motion for summary judgment, finding error based upon the defendant's breach of its active control duties. *Davis v. Portline Transportes Maritime Internacional*, 16 F.3d 532, 549 (3d Cir. 1994). The court found that one of the vessel's crew members hosed down the deck of the vessel, creating a non-obvious hazard which proximately caused the plaintiff's injury. *Id.* at 539. The plaintiff in *Davis* testified that he did not see the spot where he fell, and that the slippery nature of the spot was not obvious. *Id.* at 540. The Third Circuit believed that this evidence was sufficient to support a jury verdict under *Scindia*. *Id.*

It is important to note that in *Davis*, the vessel crew member hosed down the deck of the vessel ***after*** the stevedore-plaintiff had boarded the vessel and began operating the siwertell (a rail-mounted mobile unit specially designed for the cement industry), but before the stevedore-plaintiff departed the vessel. *Id.* The vessel crew member performed an activity within the confines of the stevedore's area of operations. By contrast, in this case, the crew of the M/V TONY G performed no activities within the confines of the back deck. The uncontroverted evidence is that Captain Darby only directed the placement of the first piece of equipment loaded by the Halliburton crew onto the back deck of the M/V TONY G. *Ct. R. at 000097.* After this first piece of equipment was set down on the back deck of the M/V

TONY G, Captain Darby's only concern was keeping the back deck of the M/V TONY G in a relatively stationary position. *Ct. R. at 000096 and 000098.* It is uncontroverted that the crew of the M/V TONY G was not involved in the backloading operation at all. *Ct. R. at 000267.*

These uncontroverted facts distinguish this case from *Davis*. Here, there is no evidence of active involvement by the vessel crew in the stevedoring operation during which Mr. Pledger was injured. The courts below did not err in holding that the active control duty was not violated in this case.

B. The *Bjaranson* Case In The Ninth Circuit

In *Bjaranson*, the Ninth Circuit reversed the district court's judgment in favor of the plaintiff. *Bjaranson v. Botelho Shipping Corp., Manila*, 873 F.2d 1204, 1209 (9th Cir. 1989). In *Bjaranson*, the court made a distinction between the active involvement duty and the active control duty. *Id.* at 1207. Neither party disputed the inapplicability of the active involvement duty. *Id.* at 1209. In the case at bar, the petitioners assert that "the Fifth Circuit and the District Court failed to address the issue of the defendants' 'actual (*sic*) involvement' in the work operation." *Petition for a Writ of Certiorari*, p. 7. Respondents believe that the petitioners meant to write "active" in place of "actual".

There is no conflict between the Fifth Circuit's decision in this case and the Ninth Circuit's decision in *Bjaranson*. The Ninth Circuit did not address the active involvement duty since that duty was not at issue in *Bjaranson*. Petitioners claim that the Fifth Circuit erred in failing to discuss the active involvement duty. There can be no conflict between

these two decisions simply because neither opinion even addressed the duty that petitioners claim may have been breached in this case.

In the case at bar, there is no evidence that any member of the crew of the M/V TONY G retained and exercised active control over the back deck, nor that they were involved in the backloading operation. To the contrary, the evidence supports the fact that the crew was not involved in the backloading operation, and that Captain Darby only directed the placement of the first piece of equipment. Petitioners have conceded that the back deck of the M/V TONY G was turned over to the Halliburton crew. There is thus no evidence to support petitioners' claim that the active involvement duty was breached. The Ninth Circuit's decision in *Bjaranson* is inapplicable.

II. Petitioners' Misstatements

Respondent Phil Guilbeau Offshore, Inc. respectfully submits that the petitioners have made the following misstatements of law and fact within their *Petition for a Writ of Certiorari*.

A. Misstatements Of Law

Petitioners quote a portion of the Fifth Circuit's decision in the case at bar that reads, "for the ship owner to be liable under the second *Scindia* duty the vessel must exercise active control over the actual methods and operative details of the longshoreman's work. *Breaux v. United States*, 1996 WL 626328 at *4 (E.D. La. 1996)." *Petition for a Writ of Certiorari*, pp. 6-7. Petitioners then assert that "This is simply not the law and there is no federal appellate court case that has ever held such." *Petition for a Writ of Certiorari*, p. 7.

Respondent respectfully submits that this is a misstatement of law, in that the Fifth Circuit correctly stated the second *Scindia* duty, and that there are at least two decisions, one appellate and one Supreme Court, which support the holding in the *Breaux* case. *See Howlett v. Birkdale Shipping Co., S.A.*, 512 U.S. 92, 114 S. Ct. 2057, 129 L. Ed. 2d 78 (1994) (stating that to impose a duty upon vessels to exercise scrutiny over a cargo loading operation to discover defects that may become hidden when the stow is complete would require vessels to inject themselves into matters beyond their ordinary province); *Clay v. Daiichi Shipping*, 237 F.3d 631 (5th Cir. 2000) (affirming the district court's decision that the vessel's role in dictating where the cargo will be stowed does not in itself justify imposing liability on the vessel owner).

B. Misstatements Of Fact

Petitioners state that "Captain Darby was at the stern controls facing the deck maneuvering the TONY G in the rough seas and directing the placement of the equipment on his back deck." *Petition for a Writ of Certiorari*, p. 3-4. Petitioners further state, "Captain Darby was certainly actively involved in this operation in continuously controlling the motion of the vessel, while at the stern control controls, and in directing the placement of the equipment on the deck." *Petition for a Writ of Certiorari*, p. 7.

Respondent respectfully submits that this is a misstatement of fact. The record evidence establishes that Captain Darby only participated in the placement of the first and heaviest piece of equipment loaded, the skid unit with the wireline (*Ct. R. at 000097*). This was for stability purposes.

Additionally, the record evidence establishes that the three men who made up the Halliburton crew were the only individuals involved in the backloading operation. *Ct. R. at 000267*. The crew of the M/V TONY G was not involved in the backloading operation at all. *Ct. R. at 000267*. During the backloading operation, the Halliburton equipment was being hoisted by a crane located on the RAM XI, which was being operated by an Aries Marine Corporation employee, Larry Hebert. *Ct. R. at 000237-38*. Mr. Meehan was communicating with Mr. Hebert from his position on the back deck of the M/V TONY G, signaling the direction and lowering of the Halliburton equipment. *Ct. R. at 000305*. There is no evidence that Captain Darby did anything more than direct the placement of the first piece of equipment placed on the M/V TONY G's back deck, then hold the boat steady for the Halliburton crew to perform the backloading operation.

Petitioners state, "The Halliburton crew played no part in decisions as to where the equipment would be placed on the deck." *Petition for a Writ of Certiorari*, p. 4. This statement is belied by the record evidence. The Halliburton equipment was being hoisted by a crane located on the RAM XI, which was being operated by an Aries Marine Corporation employee, Larry Hebert (*Ct. R. at 000237-38*). Mr. Meehan of the Halliburton crew was communicating with Mr. Hebert from his position on the back deck of the M/V TONY G, signaling the direction and lowering of the Halliburton equipment (*Ct. R. at 000305*). It was Mr. Meehan of the Halliburton crew directing the placement of the Halliburton equipment on the M/V TONY G's back deck, except for the very first piece. No reasonable inference can be drawn from this undisputed evidence to prove active involvement by the vessel crew at the time of Mr. Pledger's accident.

CONCLUSION

The Fifth Circuit properly applied the law as set forth in *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, and there is no conflict between the Fifth Circuit's decision in the case at bar and the Third and Ninth Circuits' decisions in the *Davis* and *Bjaranson* cases, respectively. The undisputed evidence establishes that the vessel crew was not actively involved in cargo operations at the time of Mr. Pledger's injury. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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